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No. 99-1257

In the Supreme Court of the United States

OCTOBER TERM, 2000

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*, PETITIONERS,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.* RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF PEOPLE FOR THE U.S.A. and THE ALLIANCE FOR AMERICA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Parties to this Brief *Amicus Curiae* address only Question 1:

Whether Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

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In the Supreme Court of the United States

No. 99-1257

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*, PETITIONERS,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.* RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* PEOPLE FOR THE USA and THE ALLIANCE FOR AMERICA

STATEMENT OF INTEREST

People for the USA and The Alliance for America (" the Parties ")[1] are non-profit organizations with the stated goals of promoting sustainable resource development, multiple use of public lands, and strong property rights consistent with the U.S. Constitution. Both organizations are characterized by individual membership and also act as national umbrellas for other groups throughout the country that share these goals. Membership under the umbrella of the two groups runs to more than two million people.

Executive and agency actions potentially representing significant conflict with the non-delegation ideal directly affect the Parties' efforts at achieving their stated goals, to the detriment of their memberships and often to the detriment of entire rural communities in which many members live or recreate. The Parties appear before the Court to encourage the strong, but narrow, measured step which it urges in this matter.

[1] No counsel for any other party authored this brief in whole or in part, and no persons or entities other than the *Amici* and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consent of the parties, with corresponding documentation simultaneously filed with the Court.

Parties appreciate that Congress, both generally, and to clarify the intent of the statutory authority at issue in the present case, must strike a delicate balance between potential health effects and burdens to other aspects of the public welfare measured in different terms. The Parties will be affected by the outcome of this case in controversy, which will establish not the ozone and particulate matter standards themselves, but the entity to appropriately establish such standards. The larger meaning for the Parties is that the Court, in accepting the narrow result sought by respondents, will reaffirm the vitality of a relevant doctrine which has been unduly relegated to the judicial backbench. The appropriate outcome urged by the Parties is a measured step in affirming the constitutional ideal of separate, identified powers for each of three distinct branches of government.

QUESTION PRESENTED

The Parties address only Question 1:

Whether Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power.

The Parties believe an affirmative answer to this question, as they urge, renders moot the subsequent two questions accepted by the Court on *certiorari* from the United States Court of Appeals for the District of Columbia Circuit in the case of *American Trucking Associations, Inc., et al. v. U.S.E.P.A. et al.*, 175 F.3d 1027 ("*Trucking*").

SUMMARY of ARGUMENT - The EPA has usurped legislative power in violation of the non-delegation doctrine which must be cured by narrow statutory invalidation

The argument in this case is not one of statutory, but constitutional, interpretation. The Parties argue that because EPA is attempting to conform its interpretation of the statute to the Constitution, there is no protection for, or deference to, agency expertise as to its authority or limitations pursuant to

the Constitution. The Parties urge that this Court see beyond the implicit nostrums of petitioners' camp against judge-made law and recognize that the matter at issue is indeed which branch of government is the appropriate body to establish standards in pursuit of which an agency sets rules. Under the particular circumstances where discretionary bounds are inadequate to address the factual setting of the rulemaking at issue, the standards or clear bounds of discretion should be set by Congress. It is EPA inappropriately usurping the lawmaking function here; and the solution is not for the judiciary to make the law, but for the Court to remand this function to Congress, in the specific instance at hand, through narrow statutory invalidation.

I. Standard Setting is a "high" Delegation

Indeed, in disavowing any connection between the NAAQS and its implementation[2], the Parties believe EPA sets the standard apart as preeminently executive-lawmaking (quasi-

[2] See *Trucking*, 175 F.3d at 1044: "According to the EPA, the NAAQS themselves impose no regulations upon small entities". This theory was advanced by EPA to defend its certification that its revised NAAQS will "not have a significant economic impact on small entities within the meaning of the RFA." PM Final Rule, 62 Fed. Reg. at 38,702/2; Ozone Final Rule, 62 Fed. Reg. at 38,887/2-3. While relying on precedent of direct versus indirect effects, the Parties think this a semantic argument in the immediate context. The appeals panel itself found no difficulty in imagining the burdens which NAAQS might pose: "Here, EPA's freedom of movement between the poles is equally unconstrained, but the poles are even farther apart-the maximum stringency would send industry not just to the brink of ruin but hurtling over it...", *Trucking*, 175 F.3d at 1037. EPA's contention that the states will do the dirty work of actual implementation demonstrates how this framework frustrates the purpose of assigning an appropriate accountable entity. State agencies frequently defend themselves with "EPA made me do it" when implementing the unpopular results of even the existing standard. Further, EPA plays the wolf in sheep's clothing which may be stripped away by 42 U.S.C. 7410 (c):

> "(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator -(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or (B) disapproves a State implementation plan submission in whole or in part.", *Id.*

legislating), not law enforcing. The Parties argue that this is axiomatic and heightens the very likelihood of an unconstitutional delegation, *i.e.*, the delegation of setting the NAAQS is a more extensive one than the delegation of NAAQS implementation. Applying a similar rationale to a pattern of enforcement against individual parties might withstand a non-delegation test that the standards presently challenged do not, *e.g.*, EPA focusing enforcement resources not on the entire range of values representing a violation of some standard, but on that range which it deems represent the preponderance of the regulated risk.

EPA having thus bifurcated or distinguished its actions under the statute at issue, the Parties disagree with Massachusetts and New Jersey (MA & NJ) that this is not a case "in which the entity to whom authority has been assigned exercises nothing but the lawmaking function", MA & NJ Brief, p. 35[3]. At issue is whether this delegated lawmaking function of setting standards is effectively bounded and thus constitutionally acceptable quasi-legislating.

Petitioners and their *Amici* argue that, since the non-delegation line established by the Court in *A.L.A. Schechter Poultry Corp. v. U.S.* , 295 U.S. 495 (1935), this Court and others have rightly approved increasingly broad delegations. That is, however, a different measure than the one the Parties describe as distinguishing the "height" of the particular delegation of standard setting.

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2 cont. Nonetheless, this question is not before this Court; but the Parties maintain that if EPA will live by the sword, it must die by it as the well. The setting of standards with no relationship to their enforcement is precipitously close to jumping the bounds of executive lawmaking and usurping the true lawmaking power.

3 It is unavoidable, if redundant, to point out that MA & NJ support this argument by claiming "the [EPA] Administrator is charged not only with setting the NAAQS but also with ensuring their implementation by the states". The Parties do not think such an argument would be so casually advanced if the Regulatory Flexibility Act (RFA), 5 U.S.C. § 601, issues were still on the judicial table. How can one logically find the powers executed by EPA conjoined to defend their wielding but separated to defend their effect?

By broader delegation, the petitioners' camp appears to mean the drawing of greater numbers of specific personal and economic activities under the direct governance of administrative agencies rather than the legislature, and the allowance of delegations that have been general rather than specific in terms of grants of authority and bounds to constrain them, see, *e.g.*, EPA Brief, p. 21 ("Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* (quoting *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989)) — in *Mistretta* this Court approved a broad delegation to set mandatory uniform sentencing guidelines for the entire country, but the standards were the sentences already set by Congress as codified in title 18 U.S.C.; and the discretion was not vague, seven relatively concrete factors were enumerated, see 28 U.S.C. 994 (c)). The Parties urge, for the sake of clarity in discussion and jurisprudence, that this Court should distinguish even these two forms of expansion by characterizing the breadth of activities or actors affected as defining the "width" of the delegation, and the extent of abstract versus concrete bounds of discretion as defining the "vagary" of the delegation.

The question of whether Section 109 of the Clean Air Act as interpreted by EPA effects an unconstitutional delegation of legislative power is one of degree measured in these several dimensions. The Parties argue that the delegation here reviewed is 'broad', *i.e.*, it could "send industry [and the Parties would add industrial society] not just to the brink of ruin but hurtling over it", *Trucking* 175 F.3d at 1037; is 'high', *i.e.*, it is an important choice of a social policy standard unrelated to the enforcement of that standard implicating, in EPA's own view, the ethical dilemma of effectively deciding the acceptable number of "early deaths...[and] hospital admissions", EPA Brief, p. 2; and is 'vague', the boundaries of discretion are established by the abstract concept of "requisite to protect the public health" ,"allowing an adequate margin of safety", 42 U.S.C. § 7409 (b)(1).

II. The Court can rule narrowly, thus with measured effect.

Petitioner's camp focuses arguments on the notion that the Act itself need not supply "determinate criterion" (see Brief of American Lung Association, p. 12-13, "*Chevron*...and other precedent of this Court recogniz[e] that Congress may legitimately write ambiguous [*i.e.*, nondeterminate] statutes".) This defense is merely dispositive of the question of whether Section 109 is facially invalid. Its line of reasoning simply defines why many delegations that may seem facially excessive may nonetheless stand without the specific circumstances of a case or controversy narrowing the question. As articulated in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 524 (Justice O'Connor, concurring) (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)).

The comfort that petitioners find in a general refusal by the courts to lay waste to the practice of delegating some function or authority to the Executive simply does not extend to protect them from review of a particular delegation in practice. "The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid", *Ibid*; and conversely the fact that the statute might operate constitutionally under some "conceivable set of circumstances", even if that were a majority of circumstances, does not universally insulate the statute from scrutiny.

To say, then, that under the precise circumstances here reviewed and relative to this particular rulemaking Section 109 is unconstitutional is not to say that it is now wholly or *prima facie* unconstitutional. It is not to call into question other actions previously taken under Section 109 involving different facts. Indeed, Justice O'Connor went quickly to the heart of the constitutional matter here at issue in *Webster* by invoking the doctrine of judicial restraint which implicitly supports *Salerno*, *i.e.*, that "[n]either will [the Court] generally 'formulate a rule

of constitutional law broader than is required by the precise facts to which it is to be applied'" *Webster*, 492 U.S. at 526 (quoting *Ashwander v. TVA*, 297 U.S. 288, 347)[4]. The Court has before it precise facts which the Parties argue demonstrate that "Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, as interpreted by the Environmental Protection Agency (EPA) in setting revised National Ambient Air Quality Standards (NAAQS) for ozone and particulate matter, effects an unconstitutional delegation of legislative power", first question presented on *certiorari* in the present matter (emphasis added).

The very specificity of the question accepted manifests the cited rule of judicial restraint. No parties ask the court to leave these narrow circumstances and thus the Parties think the remedy to the question presented will be limited in effect to the rule here at issue.[5] This Court recognizes that a narrow holding is not synonymous with a timid one, and the Parties urge that this Court take a clear but measured step to reaffirm the vital doctrine of non-delegation which has seldom broken the surface of jurisprudence since *Schechter*, but has remained just beneath.

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[4] This rule is arguably the common ground between the concurrences of Justice O'Connor and Justice Scalia, see *Webster*, 492 U.S. at 533 (Justice Scalia concurring in part and concurring in judgment), "what is involved [is]...the principle that we will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ". The point of agreement devolves thence to disagreement whether there might be "good reason" to depart from that "sound general principle", *Ibid*. The plurality, as history tells, strikes a course between the shoals of this argument. In any event, the Parties do not argue there is, nor do they think that this Court will find, "good reason" to depart from the "sound general principle" here. The case rises and falls on the precise facts at issue and the ruling should apply to the determinations here in controversy, not to others made under Section 109, unless these decisions shall prove in future proceedings to mirror those in the present matter.

[5] It is axiomatic that the analogous meaning of the ruling indeed may bring about effects in other realms, but only under analogous circumstances. Unlike EPA, which appears to assert that the standards it sets somehow have relation only to the benefits they will confer and no relation to the burdens they will ultimately impose, the Parties believe that the meaning of this case as decided will indirectly benefit other applications of authority. This does not mean that the direct effect of the case will not be narrow, and such indirect or iterative effects similarly precise. See generally, IX. A narrow and firm decision will have limited, measured and necessary effects., *infra*, p. 26-30.

III. The Court should continue to recognize that the non-delegation doctrine acts against Congress.

We concur with *Amicus* Environmental Defense Fund *et al* (EDF) that the Court has "continued to view this [non-delegation] doctrine as a constraint on congressional — not administrative — action." There is, however, no precedent cited by EDF, nor is it mutually exclusive of the possibility, to suggest that execution of the statute may not eventually expose a contextual violation which hazards some precise portion of the statute in application. Indeed, the vital constitutional doctrine which begs reaffirmation herein, as with many others, would have little meaning whatsoever if statutes may not be examined based on subsequent actions of the Executive because there exist some other "conceivable set of circumstances" which are constitutional.[6] It does not immunize the Executive for all applications of congressional authority.

EPA's findings that ozone (definitely) and particulate matter (likely) are non-threshold pollutants were unanticipated by the discretionary limits set by the statute. The fact that the

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6 The claim in *Webster* regarding the constitutionality of a Missouri state statute, 188.205, which precluded the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion was dismissed with prejudice following the state interpreting the statute as not aimed at the primary doctor patient relationship, but simply directed the state's fiscal officer not to allocate public funds for abortion counseling, see *Webster*, 492 U.S. at 512-513, part C. Surely, if a future agent of the state enforcing 188.205 should "change" the aim of the statute, *e.g.*, to prohibit state payments for any sort of care rendered by a doctor if they were shown to occasionally engage in abortion counseling with any patient, the controversy would be renewed, even though the initial claim was dismissed with prejudice. Justice O'Connor noted in *Webster* that the final arbiter for interpretation would be the Supreme Court of Missouri, *Webster*, 492 U.S. at 524; but simply having affirmed that one interpretation is within fair executive reading of the statute does not necessarily preclude executive "rereadings". It seems a surety that the claim of statutory invalidity would no doubt have returned to the federal courts based upon the hypothetical "change" in executive interpretation of the statute posed, *i.e.*, the validity of legislative action stood constantly at risk over executive interpretation.

statute provides for additional guidance from the Clean Air Scientific Advisory Committee (CASAC) in reality merely means that EPA may receive a policy endorsement for its defense of the standard it chose, but does not speak to whether the standard is within bounded discretion. Put another set of parentheses around a parenthetical clause, and you still have a parenthetical clause.

Looking to the history of the statute, EDF proposes that one may glean limit to EPA's discretion under Congress' abstract standard by reference to Senate Report No. 91-1196 at 10 (1970). EDF synthesizes a portion of the report to mean that "the purpose of the NAAQS is to protect particularly sensitive populations, not particularly sensitive individuals", EDF Brief p.13. There is some basis for such an interpretation, but EDF offers no evidence that EPA set the standard challenged herein pursuant to such guidance, or that it plans to apply similar logic to distinguishing sensitive populations and individuals in the future.

To all appearances, the precise facts of this case indicate a circumstantial breach of the non-delegation doctrine. While Congress may surely make facially unconstitutional delegations of legislative power, EDF inaccurately argues that, though the doctrine is directed against Congress, it may not be called to effect by actions of the Executive. The Parties analogize a *prima facie* statutory violation of the non-delegation doctrine as the legislative river flooding its constitutional banks, to paraphrase Justice Cardozo in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935). It thus follows that if the river is not flooding, but is running high (as the Parties contend when viewing the nature of the delegation implicit in standard setting responsibilities) it is much easier for the agency to reach into the river and take legislative water from it. The Parties think the D.C. Circuit mistakes the appropriate remedy to be some form of water treatment, rather than simply telling the agency to put the water back.

Here again, the Parties concur with *Amicus* EDF that an affirmative answer to the first question presented begs a remand to Congress, not the agency. See EDF brief p. 4 ("...the

nondelegation doctrine simply does not have a 'weak' version that is served by setting aside regulations as well as a "strong" version that compels declaring statutes unconstitutional."). The Parties believe the confusion arises because the holding of the court below was both narrow and shallow. The Parties urge this Court to hold narrowly with the D.C. Circuit but to discard the hesitancy of its approach. Thus the Parties proceed to the discussion of how the appeals panel actually answered the first question presented.

IV. The Appeals Court's tentative answer to Question One

The Parties argue that much of the confusion over properly invoking the non-delegation doctrine arises from an answer to question one incompatible with the precise facts of this case. The D.C. Circuit's ruling in the present matter effectively answers the question of whether EPA's interpretation of Section 109 effects an unconstitutional delegation of legislative power, neither "yes" nor "no", but rather "maybe".

Here we distinguish the intelligible from the rational. If an "intelligible principle" had been found in EPA's interpretation of the statute by the appellate court, and EPA's decision, regardless of how rationally defensible, fell outside the bounds of that principle, a remand to the Agency would be proper. EPA has rejected or forsworn any obviously applicable intelligible principles corollary to the boundaries implied by "requisite to protect the public health", "allowing an adequate margin of safety", 42 U.S.C. 4709 (b)(1), which would properly bound its decisionmaking on non-threshold pollutants, *e.g.*, zero-risk[7], or cost-benefit[8].

Additionally, EPA refuses to adopt the boundaries it proposes here by way of level of certainty and seriousness of

[7] While the appeals panel noted that no party before it seemed to propose the adoption of zero-risk, it held this out as a possibility, see *Trucking*, 175 F. 3d 1038. Both the appeals court, explicitly, and EPA, implicitly, must understand the quixotic quality of applying a zero standard to emissions which are a ubiquitous byproduct of so many aspects of modern society and, even more challenging, a product of nature as well. Nonetheless, it is conceivable that EPA could have adopted a 'no human contribution' standard. There is some hint that their standard approaches this level, but EPA declined to adopt .070 PPM

effects. It simply advances them as rational defenses of the standard but not controlling elements. As stated above, EPA refuses another option, to state that the division it makes here articulates between sensitive individuals and sensitive populations, thus giving some measure of legislative history support to its discretion. It defends these refusals as necessary to guard the prerogative of future administrators, but that does not explain why the current administrator will not find any determinate criteria that are binding even on her. The Parties

[7] cont. based on the fact that analogous, naturally occurring levels were occasionally found in some places, see Ozone Final Rule, 62 Fed. Reg. at 38,868/3 "[.07 standard would be] closer to peak background levels that infrequently occur in some areas due to nonanthropogenic sources of O_3 precursors, and thus more likely to be inappropriately targeted in some areas on such sources."

The Parties do not favor such a standard, but would find consistent reliance upon it at least a more intelligible, if impractical, understanding that there are discretionary confines for establishing standards which "are requisite to protect the public health", "allowing an adequate margin of safety", 42 U.S.C. 4709(b)(2). Were the Court to remand with such a principle, the EPA rule thus formulated would not only run directly at odds with continuing an industrial society, but arguably with continuing much more than a hunter-gatherer existence for the nation's populous. Indeed, the appeals court effectively admits that anything hunted or gathered would have to be eaten raw, as fire itself must likely be prohibited in such a scenario (*Trucking*, 175 F. 3d at 1038, fn. 4). Nonetheless, if this is what the CAA demands, rather than jumping the bounds of discretion to avoid a politically unpopular result, EPA should call it as it is and see if Congress will change the act.

Further, the Parties think the obvious implications of a zero-standard or zero-human-impact standard would make short work of EPA's contention that the Regulatory Flexibility Act, 5 U.S.C. § 601 and amendments to it under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, tit. II, 110 Stat. 857-74, are inapplicable to the NAAQS. No imaginable implementation of such a standard could take place without destructive upheaval among small business, big business, and the citizenry in general..

[8] Whether cost-benefit is an adequate principle to illuminate a bright line within proper discretionary bounds for the setting of a NAAQS for a non-threshold pollutant under the CAA is effectively at issue in 99-1426 consolidated herewith on the Cross-Petition of American Trucking Associations, Inc., *et al.* The Parties think cost-benefit a sound principle without proceeding to argue this question. If cost-benefit, or some other intelligible principle, is identified by this Court, it could arguably moot the excessive delegation claims. The optimal order of this Court upon such a finding, as the Parties proceed to argue in the text, is to remand the statute to the agency noting the principle[s] abandoned during the suspect agency action which are to guide its decision on reconsideration.

submit that constitutional examination of the question at issue quickly reveals that the present will of Congress is far more compelling than the imaginary predilections of a future executive or the future waffling of an extant executive agent.

Thus the answer to the first question, not contradicted by the D.C. Circuit, is in the affirmative; and, without a finding of principle to bound the discretion which would govern a remand to the Agency, the proper course is measured statutory invalidation, *i.e.*, this Court should rule narrowly which in no way means a timid ruling.

Shifting the analysis from a purely constitutional one to policy grounds, the policy consequences of a remand for an agency to find an intelligible principle reveals a perverse incentive. Agencies would be invited to wink at the non-delegation doctrine in setting standards and only truly engage the search for intelligible principle if challenged.

Interestingly, deference to agency statutory interpretations arises out of the belief in agency "expertise", the agency's "intense familiarity with the history and purposes of the legislation at issue" and agency's "practical knowledge of what will best effectuate those purposes." Judicial Deference to Administrative Interpretations of Law, Scalia, Antonin, 1989 Duke Law Journal 511, 514 (1989). Where the agencies have articulated and interpreted "intelligible principles", not ignored or never found them, a certain latitude implied by "deference" has ensued to support those actions. Where EPA admits that there is no intelligible principle, the Parties do not see why that decision should receive any less deference.[9]

The EPA Administrator has gone to lengths in attempting to justify the policy decision of where to set the standard, but her arguments still reduce to: a lower standard would cause less health effects, a higher standard would cause more health effects (see *Trucking*, 175 F.3d at 1035). More damning, the

[9] Note, this casts the case in direct opposition to *Touby v. U.S.*, 500 U.S. 160 (1991), in which the petitioners conceded there was an "intelligible principle" but asked for a higher standard. The statement of "intelligible principle" in *Touby* is not exceedingly dissimilar from that facially at operation in the present matter, but the contention of the Parties is that the principle has evaporated in the context of its inconvenience of applicability to the present circumstances.

standard chosen is essentially said to be correct because it is the one chosen by the Administrator (see EPA brief, p. 29, "...no generalized paradigm...can substitute for the Administrator's careful and reasoned assessment" (quoting 62 Fed. Reg. at 38688)). The Parties beg to differ; "the administrator's ... reasoned assessment" must relate to an intelligible principle. EPA as much as admits that this is unregulated delegation.

Nonetheless, it is all disguised in the garb of rulemaking, and thus EPA claims the competence to decide the question of whether a rational effort to set a rule outside the bounds of discretion, or with ill-defined discretion to which the administrator will not even reliably adhere in the future, is a violation of the non-delegation doctrine. This implies that this Court ought not consider the constitutional matter *de novo*, or perhaps not even consider this a constitutional matter.

It is a rather incredible contention, if not unexpected in this day of burgeoning administrative government, that essentially seeks *Chevron* deference for executive constitutional interpretations, see *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). Where shall the competency of this Court, or any other court, lie if not to set the constitutional line? Since this gambit raises the question of the standard of review to apply here the Parties proceed to address it.

V. Standard of Review

American Lung Association (ALA) argues that "[b]ecause the Clean Air Act plainly satisfies the non-delegation doctrine, the D.C. Circuit's constitutional inquiry should have stopped there — there was no occasion to proceed to a constitutionally based examination of EPA's interpretation, much less a constitutionally based narrowing of that interpretation." ALA Brief, p. 12-13. This is, at minimum, an honest admission of the nature of the present case. It is a constitutional question.

The American Lung Association offers at length its belief in the rationality of the standard chosen. This avoids addressing the question presented. The question is not whether EPA chose the right standard; rather, it is whether they could have chosen

the right standard under the particular circumstances. This is not a review of the agency's action for arbitrary nature; indeed, the Parties concede that the procedural history or this rulemaking could insulate EPA from just such a challenge, even in the face of stronger arguments favoring a different standard. This is how the constitutional question is reached in the first place.[10]

EPA's rationale, rather than insulating it from constitutional challenge, invites it. If EPA's actions in the rulemaking were irrational, the constitutional question simply would not be reached. The logic does not, however, follow that simply because EPA may have acted rationally, it acted within constitutional bounds.[11] Thus the Parties agree with ALA that a constitutional question is at issue, but cannot agree that it was improperly reached.

It is a caricature of the founders' anticipated tension between the branches to suggest that executive agents should seek deference to their interpretation of a constitutional question, but the advantage of such possible deference is too much for EPA to forego without a vain attempt to shield itself under an Administrative Procedures Act (APA)-style review umbrella.

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10 This distinguishes the present case from *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607 (1980) (*"Benzene"*). While this Court did not choose to reach then-Justice Rehnquist's quintessential concurrence on non-delegation, the Parties do no see *Benzene* as even remotely rejecting it since the question there could be readily resolved under a remand for unsupported, *i.e.*, arbitrary, decision. The constitutional question simply was not reached, Justice Rehnquist's passionate eloquence notwithstanding.

11 Common sense, *i.e.*, everyday rationality, is a rule long recognized as pertinent to the application of the non-delegation doctrine. "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense..." *J. W. Hampton, Jr., & Co. v. U. S.*, 276 U.S. 394, 406 (1928). "If Congress shall lay down by legislative act an intelligible principle to which the person or body is directed to conform, such legislative action is not a forbidden delegation of legislative power", *Id.* at 409.

This makes critical the question of what represents common sense for the purposes of this analysis. The Parties offer Justice Breyer's expressed belief that "...some risk is inevitable in any society and cannot be eliminated at reasonable cost. Thus, safety statutes must seek to eliminate *un*reasonable risk, *regardless* of their language", Breyer, Stephen, Regulation and its Reform, Harvard University Press, Cambridge, MA, 1982, p. 103 (emphasis added).

> "In the court's view, the Constitution requires that EPA supply a single principle that would enable the court to conclude that EPA's NAAQS are set at what the court deems exactly the "right" level...That approach, however, is inconsistent with the court's limited role in reviewing NAAQS. The CAA makes clear that EPA's actions in setting NAAQS are subject to review under the arbitrary or capricious standards of judicial review. See 42 U.S.C. § 7607(d)(9)", EPA Brief, p.27, 37. (see also 5 U.S.C. § 706 (2) - APA review procedures identical to 42 U.S.C. § 7607 (d)(9))

The Parties believe that EPA has not taken great effort to obtain the perspective of the appeals court in order to announce what was in that court's view. Otherwise they would know that their proposition fails, because the appeals court simply was not reviewing the NAAQS, but whether the delegation of its establishment to EPA was properly bounded. This may be enlightened by EPA's statutory interpretations but is a constitutional question. Nowhere does the court demand of EPA the "right" level or suggest it wishes to substitute its judgment as to what the "right" level might be. It does not seek

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11 cont. Such subtleties may seem to make further light of Justice Roberts' statement that "the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.", *U.S. v. Butler*, 297 U.S. 1, 62 (1936). Certainly, Justice Roberts was not advocating absurd outcomes when stating this self-evident maxim. It is axiomatic that if there are several choices within well bounded discretion attending a delegation of legislative power, a sure defense for the elimination of a given choice is an absurd outcome. It must, however, be demonstrable that the alternative choice[s] are legislatively permissible. Thus to avoid 'zero-risk', an absurd outcome as addressed both by Justice Breyer in Regulation and its Reform, cited, *infra*, and in the Parties' arguments at p. 10, n. 7, the only possible conclusion is that EPA implicitly considered other factors besides health effects to inform its health effect standard setting, and the only intelligible principle for such an exercise is cost-benefit analysis, see the Parties arguments at p. 11, n.8. If cost-benefit analysis is not available, and the absurd result may not be avoided within discretionary bounds, it is Congress which must reconcile the absurdity, not this Court or the Executive. Common sense is a proper tool to alert this Court when a potential absurdity may need to be resolved, but not a tool for determining where the power to resolve the absurdity constitutionally resides.

to determine whether the standard is arbitrary, but looks to see whether such a question may be answered, *e.g.*,

> "...Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of congress has been obeyed, would we be justified in overriding its [Congress's] choice of means for effecting its declared purpose..." *Yakus v. U.S.*, 321 U.S. 414, 425-426 (1944)

Thus the standard chosen by the D.C. Circuit is effectively that one which is viewed as having broken the dam of *Schechter*'s application. Therein it can be seen that *Schechter* was not discredited, but respected, by what are in effect its progeny.

If that respect has been loose or less than charitable as then-Justice Rehnquist suggested in his *Benzene* concurrence, see *Industrial Union Dept. v. American Petrol. Inst.*, 488 U.S. 607, 686 (1980), such animus never extended to vacating *Schechter*'s non-delegation maxim which is universally understood to attend the constitutional separation of powers. With *Schechter* squarely invoked, and its pedigree questioned, the Parties think some words must be said on its behalf.

VI. The Vitality of Non-Delegation

History suggests that *Schechter* is more damned by the nature of the case in controversy than by the jurisprudence of the decision. Surely, the constitutional doctrine of states rights was in public disrepute and, to an extent, the judicial doghouse for more than a century as the happenstance of having been invoked in *Dred Scott v. Sanford*, 60 U.S. 393 (1857). Yet the doctrine had nothing whatsoever to do with the disgraced and archaic notion of treating other people as property. Surely, but the least bit of substantive due process on Scott's behalf would have yielded a different result and thus struck the appropriate balance between federal and state powers. While history tells a different story in that case, it is most assuredly misplaced ire to condemn as inappreciative of civil rights the very doctrine

that the founders conceived of as analogous to the separation of powers and operating with it to insure those rights:

> "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [state and federal] , and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.", Madison, James *Federalist No. 51*

Schechter, by comparison, has a lesser burden to carry. It's social offense was as a judicial roadblock to the New Deal. It is often taught that *Schechter* is the progeny of some intractable justices who would not let the nation take the strong medicine that President Roosevelt prescribed. As with *Dred Scott*, the Parties think the jurisprudence of *Schechter* falsely condemned for the linchpin character of its substance and timing. Few viewed it as worthy of condemnation when Chief Justice Taft had announced the "intelligible principle" requirement in 1928, see *J. W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394, 409 (1928); but, he did so in approving a reasonably well defined, if presently viewed as economically quaint, delegation to customs officers to adjust tariffs according to the relative costs of production in the country of origin.

When *Schechter* came before the Court, even Justice Cardozo, who was the lone dissenter months earlier in the non-delegation invalidation of FDR's "hot oil" Executive Order issued pursuant to the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, saw "delegation running riot" in the "Live Poultry Code", *Schechter*, 295 U.S. at 553 (J. Cardozo, concurring). While the wage and labor provisions of the code have ultimately prevailed in other forms, the Parties do not anticipate any others to inveigh against invalidating the "straight killing" requirement, *i.e.*, that those purchasing poultry had to take the run of the coop. In other words, you couldn't pick the chickens you wanted to buy, nor could A.L.A. Schechter Poultry Co. sell you the chickens of your choice. If this is a requisite tenet of "fair competition" it was obviously a virtually

unbounded concept. Justice Cardozo described the expanse of the delegation as follows:

> "...a code is not to be restricted to the elimination of business practices that would be characterized by general acceptation as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well being or prosperity of the industry affected...If that conception shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code." *Ibid*

Amicus EDF hazards that *Schechter* is irrelevant since the regulations were effectively promulgated by private parties, *i.e.*, trade associations (see EDF Brief, p. 22). While the delegation to private individuals can be said to create conflict, members of the industry may also claim expertise. Few administrative agencies are conflict-free in terms of constituencies and factions they must serve, thus they are also attended by both conflict and expertise. Noble motives on the part of government actors were not the suspicion of the framers, thus the separation of powers to begin with. The relevant question in *Schechter*, as here, is not to whom the delegation is made, but whether an intelligible principle capable of definition bounds the delegation. In any event, the delegation in *Schechter* was effectively to the President who had to approve any interpretation.

While one can make light of the chicken killing requirements, the wage and hours provisions of the codes at issue remained a central contention within jurisprudence from the New Deal to the Great Society. In *Schechter*, these provisions were held inappropriate both on the grounds of "attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly...", *Id.* at 551[12]. Notably, when a federally chartered minimum wage was first found constitutional by this Court, see *U.S. v. Darby*, 312 U.S. 100 (1941), and *Opp Cotton Mills v. Administrator of W. and H.D.*, 312 U.S. 126

(1941), it applied only to businesses transacting across state lines, and was set by Congress at 25 cents per hour with a delegation allowing the Administrator of the Wage and Hour Division to increase the wage where merited, but this discretionary increase could not provide a wage in excess of 40 cents per hour (see Fair Labor Standards Act of 1938, 52 Stat. 1060). Thus, the Parties would describe this as a well bounded, i.e. less vague, delegation, albeit wide in the sense that it applied across the interstate economy of the entire country (see also *Mistretta v. U.S.*, 488 U.S. 361, 368 (1989), approving delegation to United States Sentencing Commission of the establishment of determinate sentencing guidelines where: "The maximum of the range ordinarily may not exceed the minimum by more than the greater of 25% or six months, and each sentence is to be within the limit provided by existing law." *Id.*). Of late, the Congress simply sets the minimum wage by statute. Rather than a repudiation of *Schechter*'s non-delegation doctrine, this is a virtual endorsement.

Schechter remained similarly inviolate as a matter of the historically recognized 'switch in time, that saved nine', referring primarily to a pair of watershed of rulings which cast the Court in a more accommodating light relative to New Deal undertakings. Neither of the rulings considered the pivot of the 'switch in time' implicated any change in the Court's view on non-delegation. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), approved a minimum wage statute of the State of Washington and is considered to have rent the cloth of substantive due process using as a shears the police powers of

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12 While this theory of the commerce clause, Art. I, Sec. 8, U.S. Constitution, as a significant bar to federal action has arguably fallen a bit by the wayside since *Schechter*, it is the logical analog of the quite healthy judicial rule of "indirect effects" which insulated EPA's standard setting decision in the present matter from examination for the burdens of its effect under the Regulatory Flexibility Act, 5 U.S.C. § 601, and amendments to it under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, tit. II, 110 Stat. 857-74, see *Trucking*, 175 F.3d at 1043-1045. Perhaps foreshadowing the debate over renewed vigor for the non-delegation trip wire, the high tide of commerce clause justification for sweeping federal mandates is receding as that under its ambit diminishes in consequence of recent precedents, *e.g.*, *U.S. v. Lopez*, 514 U.S. 549 (1995).

the state — not the federal government. Congressional delegations were not in issue. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), is strictly a commerce clause case (Art. I, Sec. 8, U.S. Constitution). While the action in controversy was a delegated action, no party argued, and the Court did not conceive, that dismissal of workers for labor organizing activities was not within a well bounded discretion described by "unfair labor practices". The question was whether circumstances fell under the ambit of federal jurisdiction. Thus delegation is only mentioned in passing with the indication that it is inapposite.

This is not to say that petitioner's camp does not fairly bring examples of suspect delegations that have survived judicial review. Kenneth Culp Davis does likewise in articulating what he conceived of as the "failure of non-delegation", see generally, Davis, Kenneth Culp, A New Approach to Delegation, 36 U. Chi. L. Rev. 712 (1969). Davis points to case studies of interstate trucking regulation, cable television regulation, and natural gas supplier regulation. Of these, two out of three have been essentially deregulated by Congress, arguably in consequence of the very failures he cites. Without proper control on delegation, the country evidently faces a boom and bust regulatory environment.

But, is a return to an effective non-delegation doctrine somehow as wild a swing of the pendulum as petitioners intimate as compared with the outcomes just described? The Parties do not think the measured step they urge hazards a "return" to any distinct legal sentiment, particularly some interpretation once rendering resistance to the New Deal. The Parties believe that the Court, whether the current Court or that of FDR's day, is to invoke the "common sense" discussed, *supra*, in cognizance of the force of its rulings and measure its steps so as to be seen as such, if not widely and substantively digested, by the citizenry.

VII. *Chevron* Begs *Schechter* —The Need for Non-Delegation

Justice Scalia has articulated why the idea of yielding judicial deference to the executive on ambiguous statutory interpretations is more sensible than it sounds on its face (see

Scalia, Antonin, Judicial Deference to Administrative Interpretations of Law, cited, *supra*). The Parties argue that, pursuant to *Chevron*, the regulatory ambit has increased to a point where the executive and independent agencies feel justified in dipping water from the legislative river, simply if they feel it rationally defensible. Such actions may be the providence of the most well-intentioned of executives, but the drink they seek may be attained constitutionally by running for legislative office. As Justice Scalia is also known for saying, the Constitution gives the Congress the power to make laws, not the power to make legislators.

The explicit requests here for *Chevron* deference to executive constitutional interpretations (see EPA Brief, p. 8; ALA Brief, p. 13; and *Amicus* New York's Brief, p. 20) and identical if implicit requests resulting from casting this matter as limited to an APA substantive review of agency action for arbitrary application of ambiguous statutory provisions (see EPA Brief, p. 27, 37; and *Amicus* EDF's brief, p. 5) indicate that the decision has created almost an artificial intelligence sort of vortex in the administrative agencies. In the mold of the idiomatic science fictional computer that is taught to think and then takes over its master, reflecting a theme coursing through literature from Shelley's Frankenstein to Clarke's 2001 A Space Odyssey, the agencies, once handed *Chevron*, have responded predictably to expand their influence over the other branches and over the country as a whole as EPA seeks in the present case. This does not make *Chevron* wrong, but demonstrates a system of checks that is out of balance.

What is needed here is not a return to pre-New Deal jurisprudence, but recognition that some more dormant theory of jurisprudence remains vibrant. *Schechter* has indeed slumbered, but is surely the needed linchpin to the checks and balances of administrative execution of legislative grants of authority. In fact, without such a reminder as this case is positioned to offer, administrative agencies, and even some courts are losing sight, in some important respects, of from whence the power they wield has come, *e.g.*, the Supreme Court of North Carolina recently ruled in a separation of powers case,

Wallace v. Bone, 286 S.E. 2d 79 (1982), that an Environmental Management Commission (EMC) which sets standards and promulgates rules is an administrative body and thus has "no relation to the function of the legislative branch of government", *Id.* at 88. The formalistic result in the case, finding it inappropriate for legislators to serve on this EMC, is not incredible; but the notion that standard setting and rulemaking, a portion of the administrative powers of the EMC have "no relation to the function of the legislative branch of government" is certainly as hostile to the separation of powers as legislators sitting on the EMC.

VIII. Separation of Powers Jurisprudence is, by Nature and Design, Formalistic.

There simply can be little rationale for formalistic attentions to the separation of powers in some arenas while not in others. The line-item veto (see generally, *Clinton v. New York* , 524 U.S. 417 (1998)) and the legislative veto (see generally, *INS v. Chada*, 462 U.S. 919 (1983)) have been vanquished through formalistic interpretations of this Court. Legislative delegation must be subject to the same rigors in order to uphold the values inherent in separation of powers.

Parties urge that the Court view the battle of *New York* in a context of Congress presenting to the President a spending bill which he may only veto in its entirety, however this bill contains the following caveat: "The President shall spend the allocated sums, or afford the contemplated tax relief only if he deems it requisite to the public welfare" (borrowing from 42 U.S.C. § 4709 (b)(2), although requisite to "the national interest" could surely substitute as it did in the discretionary condition precedent to exercise of the line-item veto, see 2 U.S.C. § 691(a)9A)(iii) (invalidated in *New York*)).

One cannot ensure appropriate separation of powers by closing off one avenue but leaving other areas for usurpation available. There can be little doubt that Congress passed the Line Item Veto Act, 2 U.S.C. § 691 (invalidated in *New York*), to solve that nettlesome problem of government, trimming the fat, that it was unable to accomplish itself. If this assistance of

the Executive were not available under the constitutional separation of powers because it would involve legislating by less than the constitutional algorithm of passage by both houses and presentment, is it no less legislating because it appears in the form of delegated executive action, rather than in a form internal to the legislative process?

The Parties do not deny that the President has certain, if limited, latitude in the expenditure of funds in operating his own executive and independent agencies, which is most often manifest in not actually spending allocated funds. It seems likely, though, that if the President failed to transmit funds to states or local entities to which funds had been allocated by Congress or if the President attempted to collect a tax which Congress had explicitly abated, and either action were defended in legal proceedings on the pretext of the aforementioned untethered delegation, that this Court should arrive at the same result it did in *New York*.

Likewise, one of the most logical mechanisms for regulating delegation, the legislative veto, is forsworn on the same grounds as the line-item veto, that it is an incomplete or improper making of law under Article I, Section 7 of the U.S. Constitution. Congress may only effect a legislative veto by legislating completely. A syllogistic exercise reveals that since an Executive veto of a legislative bill must be overridden by a two-thirds vote of both houses of Congress, and since a Congressional veto by complete legislation is aimed at Executive action; a Congressional override of agency action will require supermajoritarian rather than simple majoritarian support. In practice, the full legislative process is seldom applied to such a task as the risk of validating the very action which has raised Congress' ire is, ironically, significant, see *e.g.*, *U.S. v. Riverside Bayview Homes*, 474 U.S. 121 (1985) — withdrawal of congressional action against Executive interpretation later held relevant to judicial upholding of disputed interpretation.[13]

13 Decisions in the vein of *Riverside* implicitly insulate administrative conduct further still from congressional oversight. The Parties consider it highly suspect whether Congress actually intended the requirement for a permit to fill "navigable waters" to extend to land areas not subject to regular inundation when it

Thus the notion collapses that Congress may effectively regulate its delegations after the fact. While the mechanism theoretically exists, it cannot be viewed as providing the proper check on the bounds of discretion exercised by administrative agencies.

Thus, for the time being, this Court is the only forum in which an effective veto of legislative power unconstitutionally assumed by the executive or administrative agents may be had. The future may hold further refinements or improvements. Indeed the Parties note then-Judge Breyer's effective invitation to Congress to try what we term for these purposes the "legislative proto", see Breyer, Stephen, The Legislative Veto After *Chada*, 72 Georgetown Law Journal 785 (1984),

> "My [legislative] veto substitute...could replace veto provisions in present statutes with provisions that conditioned the legal effect of exercise of delegated authority on subsequent enactment of a confirmatory statute", *Id.* at 793.[14]

13 cont. passed Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Nonetheless, in resolving the apparent ambiguity the Court coupled the newly announced *Chevron* deference with the following thoughts of Justice White, writing for the Court:

> "Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.", *Riverside*, 474 U.S. at 137.

The significant peril that this hazards for Congress is manifest. If Congress examines statutory ambiguity as is clearly within its ambit, but fails a supermajoritarian effort at invalidating questionable adherence by an agency's statutory interpretation to Congressional intent — this effect not always being clear in a straight up vote, but perhaps manifesting itself as the abandonment of corrective language in committee or conference as a consequence of the futility of an eventual supermajoritarian test — Congress's failure to legislate an explicit correction will be held to virtually endorse the interpretation. On the other hand if the Congress acquiesces quietly to the standard over some time, a form of legislative *stare decisis* will attach. The Parties suggest that this presents a 'damned if they do and damned if they don't' choice which should be avoided.

14 Then-Judge Breyer posited that such an approach would most closely approximate the "legislative veto" if Congress were to adopt "fast-track" rules for consideration of such confirmatory statutes. Even if Justice Breyer

We believe this a manifestly sensible recommendation, both generally, and in the present case. Congress could obviously use such a mechanism for the reconciliation of ambiguities that would properly bound *Chevron* deference in statutory interpretations. Then-Judge Breyer imagined that it might obviate the principal function of judicial review of agency actions, *i.e.*, determining whether they are arbitrary when held up against the statute under which they are taken, see *Id.* at 795. Since the rules themselves, which would be confirmed by statute, are then subject to agency "policies and practices" the Parties believe that the confirmatory statute idea does not hazard a work shortage for jurists.

In such a "legislative proto" world, the courts would be more free to concentrate on the issues of enforcement discretion which Kenneth Culp Davis tends to commingle with non-delegation problems (see generally Davis, Kenneth Culp, A New Approach to Delegation, 36 U. Chi. L. Rev. 713 (1969), esp. Chapter IV. Judicial Acquiescence in Administrative Exercise of Ungranted Power, *Id.* at 722-725). The Parties agree that selective enforcement and prosecutorial discretion go begging for redress as surely today as they did in 1969; however, these are preponderantly issues of performance of clearly executive duties, not those delegated to the agency by the legislature. It clouds the issue to reach purely executive discretion when examining discretionary grants of legislative power.

The Parties are, in fact, so impressed with the idea of the "legislative proto" that they essentially ask this Court to effect the judicial equivalent for the constitutional question before it (one that the Parties acknowledge would likely seldom be reached if the "legislative proto" were in place in this and other statutes). Thus the Parties encourage this Court to answer the

14 cont. posited this substitute more as an abstract constitutional proposition than a policy prerogative, the parties view the mechanism as a more systematic approach offering the potential to overcome some of the deficiencies that Justice Breyer apparently sees in looking to Congress for improvements in regulatory outcomes that speak to "a public that 'really' wants an overall result that differs from the substance-specific preferences revealed on particular occasions", Breyer, Stephen, Breaking the Vicious Circle: Toward Effective Risk Regulation, Harvard University Press, Cambridge, MA, 1993, p. 55, 57

first question presented in the affirmative and remand the statute in the narrow context of the rulemaking at issue here to Congress for a confirmatory statute, or other action or inaction of its choosing. For now, that is the only way to protect the Constitution in the present context. Judicial restraint would otherwise be mistakenly exercised to 'save' this statute in the narrow context in which its validity is here in question. This is the solution accomplishing the main purpose of the non-delegation doctrine.

> "[to] ensure[ ] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will", *Benzene*, 448 U.S. 607, 685 (Rehnquist, J., concurring).

IX. A narrow but firm decision will have limited, measured and necessary effects.

At the time, governmental calamity was widely if hyperbolically suggested as a result of the formalistic holdings in *Chada*. Almost a generation later, it appears more a legislative speed bump than a roadblock. While a proper and deliberate alternative to the legislative veto has taken its time appearing — and to the extent that it exists is reflected by, *inter alia*, the Regulatory Flexibility Act, 5 U.S.C. § 601, which, ironically, were avoided in the present rulemaking — no one would allege that civil society is on the brink of collapse as a result.

The Parties admit that reaffirming the lines between executive and legislative power in the non-delegation context will be ritualistically condemned by some as unappreciative of the complexities of modern society. But, the Parties favor replacing neither the constitutional system nor the jury system, both of which have been subject to criticisms of their contemporary relevance in a post-industrial age, with a tyranny of technocracy.[15] Still, one must address whether the practical result of the narrow holdings the Parties beg would somehow

[15] Then-Judge Breyer recognized that early administrative thinkers at the time of the New Deal saw the possibility that regulation itself, as opposed to portions of its substance, would become its own "science", including self-imposed discipline:

hazard wide upheaval inversely proportional to their focus.

The Parties suppose that petitioners' camp, who essentially beg that this Court reverse the D.C. Circuit by finding their policy imperatives superior to time-worn constitutional bounds, would be aghast at the answer the Parties propose. But Parties doubt unwarranted impacts from ruling narrowly yet still firmly. No assault has been made on the existing standard, nor any suggestion that it and other standards would evaporate as a matter of the precise considerations here. Not only has the former standard stood unchallenged for some time giving it that measure of legislative *stare decisis*, all would likely admit, but it has been explicitly articulated by Congress in the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399, 42 U.S.C. § 7511(a)(1). That is not to say that it was never conceived that EPA would revise the standard, but that EPA was certainly envisioned to so do within constitutional bounds. Narrow invalidity for the new standard will clearly leave the former standard as protection.

15 cont. "In place of legal procedures and safeguards, defenders of the New Deal agencies relied upon the expert professionalism of administrators...The legitimacy of their decisions would rest upon their "scientific" correctness.", Breyer, Stephen, Regulation and its Reform, Harvard University Press, Cambridge, MA, 1982, p. 351 (referencing Landis, J., The Administrative Process, New Haven, CT 1938).

Justice Breyer has also noticed that this notion, and the subsequent notion of the 1940's and the 1950's that "fair and open procedures, as embodied in the Administrative Procedures Act [Act of June 11, 1946, ch. 324, 60 Stat. 237], would keep agency power in check" have both been unfulfilled. See Breyer, Stephen, The Legislative Veto after *Chada*, 72 Georgetown L. J. 785, 796 (1984). Even if one viewed the "scientific managerialism" model of the 1930s as even somewhat relevant, it vacates the very model of agency expertise in the present matter. EPA itself admits that the standard revision presently at issue involves trading health effects, and indeed lives, for practicality. This is a moral, not scientific conundrum.

It is remotely conceivable that Congress could have set up some kind of philosophical review authority to interpret "an adequate margin of safety" in an ethical context; but Congress did not do so. This imaginary moral authority could certainly create facial non-delegation problems; although, its area of expertise would, at least theoretically, be suitable to the decision required here. That said, it is a proposition manifestly contrary to our system of government. Be they Rhodes Scholars or rogues, this country selects its policy leaders through congressional elections. Science should inform policy, not make it.

This is also true for particulate matter, PM 10, for which a current standard exists. However, one might argue that this is the first standard setting for small particulate matter, *i.e.*, PM 2.5 — albeit PM 2.5 is, to some effect, included in PM 10. Assuming, *arguendo*, however that the standard at issue is a non-existing standard, the consequence of invalidating the rule is merely delaying it for a time to see if Congress will provide it some structure, but the rule has never existed for the 30 years of the CAA. This is not somehow the upsetting of 30 years of settled enforcement.

Thus it can be seen that when inquiring into the impact of this narrow statutory invalidation, where the action in question conceives of a new standard or plan, no long-standing program is at hazard. Where a long-standing standard or program exists and some rule or revision exceeds discretionary bounds, meriting a similar fate to that which the Parties urge for the rule here, the long-standing rule or program remains in place.

Thus a decision to find the statute narrowly invalid, as interpreted, with respect to this rulemaking and remanding it to Congress for some confirmatory or clarifying statute actually has very little effect on the execution of government programs.

It may be argued that a danger exists that Congress will not confirm the rule. To argue this in the particular case is to admit to a usurpation of congressional authority in a way for which the Agency is unsure it could obtain congressional endorsement. Of course, in this situation, the shoe is properly on the other foot. The current situation is that Congress is simply understood as having endorsed the interpretation whether it does nothing or whether it fails at a legislative attempt to overturn it (see the Parties' arguments at p. 23-24, n. 13, *supra*).

The truly old saw in this regard is that Congress simply does not have the time or expertise to make the necessary rules. That does not justify usurpation and it presupposes to an extent that Congress would start afresh, without the benefit of the public debate attending the invalidated rulemaking process to inform its own deliberations. Even with an administrative record, it is certain that congressional undertakings are no mean feat; but neither is there any evidence that Congress cannot and

will not act with dispatch when the social policy at stake demands it. Congress's failure to act in whatever time frame can justly be interpreted as lacking the very will that agencies so often claim to be carrying out. The Parties suggest that where there is no will, there is no way.

We must truly defer, in the realm of whether more effective congressional engagement in writing or confirming rules to avoid excessive delegation somehow hazards the end of civil government, to the preeminent scholar in this regard. With no impoliteness intended to Kenneth Culp Davis whose work the EDF believes informed the direction of the appeals court (see EDF Brief, p. 6), the Parties must recommend instead David Schoenbrod as a scholarly authority who argues succinctly and on point that "Congress Has Enough Time to Make the Laws". In fact he devotes an entire chapter of his seminal work Power Without Responsibility, How Congress Abuses the People Through Delegation (Yale University Press, New Haven, 1993), to just this proposition (see pp. 135-152).

Reference to the importance of Schoenbrod's work by the Parties is critical beyond their respect for his scholarship. As groups composed of resource workers, property owners and recreators who strongly believe that excessive delegation of legislative power, or its corollary usurpation by the executive, has infringed property rights, limited multiple use of public lands, and has damaged communities and undercut rural industriousness, the Parties see an executive that has overreached. This is the Parties' admitted motivation in appearing here, but as a consequence of the focus of their activism on advancing property rights, sustainable resource exploitation and public lands access, the Parties are inappropriately but unavoidably conceived of by policy adversaries as not valuing environmental quality in the pursuit of their objectives. Schoenbrod, on the other hand, whose work the Parties recommend to the Court in resolving this matter, is effectively the Parties' complement, focusing on environmental quality that may go begging as a result of excessive delegation:

"As a student during the 1960s, I spent my summers working for the perfect apostle of the New Deal, Hubert Humphrey, and aspired someday to sit in Congress or run an agency that, in the New Deal mold, would make laws. By the 1970s, like much of my generation, I had come to distrust agencies, and served as one of the leaders of the Natural Resources Defense Council, a non-profit corporation that pressured agencies to make laws that would fulfill the promises of environmental statutes. That experience made me see statutes that delegate as a way for politicians to play to the grandstand rather than to make the hard choices needed to protect the public. It started me wondering whether the public really benefits from delegation. Seeking an answer to that question, I became a legal scholar.

I now believe that delegation has produced a regulatory system so cumbersome that it cannot provide the protection that people do need, so large that it needlessly stifles the economy, and so complex that it keeps voters from knowing whom to hold accountable for the consequences." *Id.* at ix-x.

Schoenbrod's work is a significant testament to how limited delegation can work, garnering praise from reviewers as disparate as former Senator Bill Bradley and Judge Robert H. Bork. Schoenbrod's ideas are not gospel despite the metaphor, and certainly should be subject to the rigors of the very governmental processes he would improve. This debate, however, will never be meaningfully joined without this Court's willingness to force the hands of the players.

CONCLUSION — A narrow but firm holding is called for.

In consideration of the foregoing, the Parties urge that this Court answer question one as presented in the affirmative and, in so doing, declare Section 109 of the Clean Air Act, 42 U.S.C. § 4709, unconstitutional and void as interpreted by EPA with respect to any revision of the ozone and particulate matter standards.

Respectfully submitted.

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